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No. 80-1986

SUPREME COURT OF THE UNITED STATES

October Term, 1980

DONALD E. DISTLER - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the court of appeals err in holding that there was sufficient evidence to warrant a finding of guilt beyond a reasonable doubt in this nationally important case which is the first criminal conviction by a jury under the Federal Water Pollution Control Act, 33 U.S.C. § 1319?

2. Did the court of appeals err by failing to address the statistical probability evidence issue in affirming petitioner's conviction where 1) another circuit has reasoned and held that statistical probability evidence unjustly suggests, by quantification, that guilt has been established beyond a reasonable doubt, 2) such evidence had the appearance of certainty as to ultimate facts and unjustly usurped the function of the jury in this case, and 3) the prosecution intentionally employed such evidence at trial and in closing argument to unfairly influence the jury's deliberations, so that review should be granted to resolve a conflict of circuits and so that the question of admissibility and unjust impact of statistical probability evidence can be settled by this Court?

3. Was petitioner's Sixth Amendment right to *an open and public trial* abridged when prior grand jury testimony of eyewitnesses, crucial to the jury's verdict of guilty, was admitted *as substantive evidence* pursuant to Federal Rule of Evidence 801(d)(1)(A), the injustice being the substantive use of inculpatory evidence developed in a secret proceeding?

4. Did the court of appeals err by failing to address the introduction-of-prior-inconsistent-statements issue in affirming petitioner's conviction where 1) prior inconsistent statements were not disclosed at the time the witnesses testified contrary to 18 U.S.C. § 3500, 2) the statements were introduced under Federal Rule of Evidence 613(b) contrary to that rule's foundation requirement, and 3) the statements were admitted in flagrant violation of previous

rulings of this Court and other circuits, so that review should be granted to exercise the supervisory power of this Court?

5. Did the court of appeals err by failing to address the statutory vagueness issue in affirming petitioner's conviction where 1) the language of the Federal Water Pollution Control Act enforcement statute (33 U.S.C. § 1319) is so vague that a person of reasonable intelligence could not foresee imposition of a criminal penalty prior to the issuance of a compliance order or the inception of a civil action, 2) this Court has repeatedly held that one is not to be subjected to a penalty unless the words of the statute plainly impose it, and 3) imposition of the criminal penalty in this case violates petitioner's Sixth and Fifth Amendment rights to notice and due process, so that review should be granted to settle the question of vagueness in this statute?

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SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

DONALD E. DISTLER - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion of the court of appeals decided and filed on February 12, 1981.

OPINION BELOW

The opinion of the court of appeals decided and filed on February 12, 1981 (Appendix A) is reported at ___ F. 2d ___ (6th Cir. 1981). A petition for rehearing was filed *en banc*. The order of the court of appeals denying the petition for hearing was entered on March 31, 1981 (Appendix B).

JURISDICTION

The opinion of the court of appeals (Appendix A) was decided and filed on Feruary 12, 1981; and a timely Petition for Rehearing was denied by order of the court of appeals for the Sixth Circuit (Appendix

B) on March 31, 1981. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Provisions:

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

The Sixth Amendment to the United States Constitution provides in pertinent parts as follows:

> In all criminal prosecutions the accused shall enjoy the right to a . . . public trial. . . .
>
> In all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . .

Statutory Provisions:

> United States Code, Title 18
> Section 3500, Demands for Production of Statements and Reports of Witnesses. [Pertinent text set forth in Appendix, *infra.*]
>
> United States Code, Title 33

Sections 1311, 1317, and 1319 of the Federal Water Pollution Control Act. [Pertinent text set forth in Appendix, *infra.*]

Rules:

Federal Rule of Evidence 613(b) provides as follows:

> (b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

Federal Rule of Evidence 801(d)(1)(A) provides as follows:

> (d) A Statement is not hearsay if (1) the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at trial, hearing, or other proceeding, or in a deposition.

STATEMENT OF THE CASE

Petitioner was convicted after a jury trial in the Western District of Kentucky of two violations of the Federal Water Pollution Control Act (33 U.S.C. § 1251 *et seq.*) Criminal penalties were imposed pursuant to Section 1319 for Petitioner's alleged failure to follow guidelines for the disposal of pollutants established under Sections 1311 and 1317.

Petitioner was convicted of discharging toxic waste pollutants called PCL bottoms into the Ohio River and into the Ohio River through the sewers of the Louis-

ville and Jefferson County Metropolitan Sewer District. Co-defendants were acquitted.

Petitioner operated Kentucky Liquid Recycling Company, Inc., in New Albany, Indiana, whose business was the storage of industrial wastes. K.L.R. contracted with Chem-Dyne Corporation of Hamilton, Ohio, to store PCL bottoms which Chem-Dyne transported from Velsicol Chemical Corporation in Memphis, Tennessee to K.L.R. in New Albany. In the course of operating his business, petitioner on several occasions visited a Lewis Avenue demolition site in Louisville for the purpose of purchasing salvage materials from the demolition company.

When portions of the Louisville sewers became contaminated in March, 1977, investigators began to conclude petitioner's involvement in the contamination because 1) he was in the business of storing PCL bottoms, and 2) he purchased salvage materials at a Lewis Avenue demolition location adjacent to the suspected site where contaminants were introduced into the sewers. Investigation blossomed into indictment, and trial resulted in conviction. On appeal, petitioner raised important issues which were not addressed by the court of appeals, three of which are questioned here. On appeal, the court of appeals did consider the sufficiency of evidence issue questioned here but affirmed, it is respectfully submitted, on the basis of misconceived facts.

ARGUMENT

1. Did the court of appeals err in holding that there was sufficient evidence to warrant a finding of guilt beyond a reasonable doubt in this nationally important case which is the first criminal conviction by a jury under the Federal Water Pollution Control Act, 33 U.S.C. § 1319?

This Court has held, in *Jackson* v. *Virginia,* 443 U. S. 307 (1979), that the standard for review of insufficient evidence is

> whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.,* at 319.

In the present case, it is respectfully urged that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt," *id.*, p. 324, so that review should be granted to reverse petitioner's conviction.

All proof of petitioner's involvement in this case was circumstantial. The essential accusation at trial was that petitioner had discharged toxic wastes, PCL bottoms, into the sewers of Louisville, on or about February or March, 1977, at a site known as Lewis Avenue, between 26th, 28th, Howard and Broadway Streets. Circumstantial evidence tending to link petitioner to the alleged offense included the facts that he admittedly was in the business of storing such toxic wastes at his company Kentucky Liquid Recycling in

New Albany, Indiana [K.L.R.], and that he admittedly had been in the vicinity of the Lewis Avenue discharge site in the ordinary course of business purchasing salvage materials from a demolition operation at a Lewis Avenue location.

In addition to these uncontested circumstances, scientific expert "oil matching" testimony was introduced tending to connect materials stored in petitioner's tanks at K.L.R. to materials recovered from the Louisville sewers. It is submitted that expert testimony tending to involve the company [K.L.R] to the offense does not rise to the level of connecting petitioner to the offense. This observation is highlighted by the jury's acquittal of co-defendant Horn, also an officer of K.L.R. and closely associated to petitioner and petitioner's activities throughout the trial.

In addition to the above circumstances, eyewitness testimony was introduced. At trial, eyewitness laborers at the demolition operation at the Lewis Avenue location testified that they *could not identify petitioner* as having committed the offense charged. The prosecution introduced prior grand jury testimony of these eyewitness laborers as substantive evidence purporting to show petitioner's involvement with the offense charged. In this regard, it is submitted that the circuit court's cursory conclusion, "He [petitioner] was seen washing these tankers out, and on some occasions a hose was seen extending from these tankers into the sewer," is misleading. [Court of appeals opinion, *infra,* Appendix, p. 42.] In fact, even with the grand jury excerpts considered, petitioner was never positively identified by

the eyewitnesses as having perpetrated the discharge as alleged in the indictment.

Absent the above-capsualized scientific expert evidence and the eyewitness evidence, the prosecution had *no* case probative of petitioner's guilt as charged. Even with this evidence, it is respectfully submitted that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson* v. *Virginia, supra,* p. 324. A corollary to this general insufficiency of evidence question is that this conviction solely based upon substantive use of prior grand jury testimony even if held sufficient would in itself violate due process. *See,* Senate Committee Report 1974, U. S. Code Cong. & Admin. News, pp. 7051, 7063 n. 21; 4 Weinstein's Evidence 801-89.

2. Did the court of appeals err by failing to address the statistical probability evidence issue in affirming petitioner's conviction where 1) another circuit has reasoned and held that statistical probability evidence unjustly suggests, by quantification, that guilt has been established beyond a reasonable doubt, 2) such evidence had the appearance of certainty as to ultimate facts and unjustly usurped the function of the jury in this case, and 3) the prosecution intentionally employed such evidence at trial and in closing argument to unfairly influence the jury's deliberations, so that review should be granted to resolve a conflict of circuits and so that the question of admissibility and unjust impact of statistical probability evidence can be settled by this Court?

On appeal, the question of admissibility and unfair impact of statistical probability evidence was raised but was not ruled upon by the court of appeals. The

court of appeals' failure to address this issue in affirming petitioner's conviction places the court of appeals in conflict with another circuit on this issue. In *United States* v. *Massey,* 594 F. 2d 676 (8th Cir. 1979), the Eighth Circuit held that it was reversible error to allow introduction of mathematical probabilities evidence and for the prosecutor, in closing argument, to infuse in the minds of the jury confusion in identifying samples with identifying the perpetrator of the crime. The Eighth Circuit reasoned,

> Our concern over this evidence is . . . with its potentially exaggerated impact upon the trier of fact. Testimony expressing opinions or conclusions in terms of statistical probabilities can make the uncertain seem all but proven, and suggest, by quantification, satisfaction of the requirement that guilt be established "beyond a reasonable doubt." *Id.,* p. 681.

It is respectfully submitted that the holding and reasoning of the Eighth Circuit in *Massey,* applied to the facts of the present case, would result in reversal of petitioner's conviction so that a genuine conflict of circuits exists which should be resolved by this Court.

By way of underscoring the existence of the conflict exposited above, the following language appears in the A. L. R. annotation regarding this issue:

> In all cases in which the question arose, the court held that it was reversible error to permit an expert witness to testify as to mathematical probabilities that were offered to show that the

> defendant was the person who committed the alleged crime. 36 *A. L. R. 3d* 1194, at 1194.

The presence of this language in A. L. R. 3d, contrary to the holding below, demonstrates that resolution of the present question would be of national importance.

The facts and circumstances underlying the present issue may be set forth as follows. The scientific expert witnesses who testified that sewer samples matched samples from a storage tank at petitioner's Kentucky Liquid Recycling Company claimed a statistical probability of reliability of 99% accuracy for their methods. This statistical probability evidence was admitted through the witnesses Benz and Allen at length. In closing argument, the prosecutor imbued this trial testimony with exaggerated impact by emphasizing that the scientific expert matching testimony pointed to petitioner's K.L.R. Company and was "99 per cent reliable."

> They have made these determinations on the reliability so that he [the expert] could testify that the three methods each point to KLR, are independently reliable and together are 99 per cent reliable. [Prosecutor's closing argument, T.E. Vol. XXVII, pp. 82, 143.]

Such testimony and comment had an unfairly conclusive impact upon the jury to the prejudice of petitioner.

It is respectfully submitted that review should be granted to resolve the conflict of circuits on the issue of admissibility and unjust impact of statistical prob-

ability evidence and to settle this question which has not been previously decided by this Court.

3. **Was petitioner's Sixth Amendment right to *an open and public trial* abridged when prior grand jury testimony of eyewitnesses, crucial to the jury's verdict of guilty, was admitted *as substantive evidence* pursuant to Federal Rule of Evidence 801(d)(1)(A), the injustice being the substantive use of inculpatory evidence developed in a secret proceeding?**

Petitioner respectfully submits the substantive use pursuant to F.R.E. 801 (d)(1)(A), of prior grand jury testimony to convict criminal defendants abridges both the Sixth Amendment right to confrontation and the Sixth Amendment right to an open and public trial.

However, through the instant question, petitioner submits that *the substantive use* of prior grand jury testimony pursuant to Rule 801(d)(1)(A) is unconstitutional because it abridges the right to open trial vouchsafed by the Sixth Amendment. Just such a question was presented to the court of appeals in addition to a confrontation question, but the court of appeals chose to answer only the confrontation question in affirming petitioner's conviction.

The question of whether the substantive use of prior grand jury testimony can survive an open trial attack is of national significance. Rule 801(d)(1)(A) has added a poison dart to the federal prosecutor's quiver which in many cases (including the present case) is clearly the difference between conviction and acquittal. The rule which allows such a dart may well

be unconstitutional. The justices of this Court have long indicated that the substantive use of evidence adduced at secret proceedings is unconstitutional.

Mr. Justice Black noted "the traditional Anglo-American distrust for secret trials" in *In Re Oliver,* 333 U. S. 257, 268 (1948), pointing out.

> that trials in the Star Chamber were public, and that witnesses against the accused were examined privately with no opportunity for him to discredit them. *Id.,* n. 22.

In the same way, the eyewitnesses in petitioner's case were examined privately before the grand jury and their secret testimony was later used substantively at trial. As substantive evidence, their secretly adduced testimony could never be erased no matter what else the eyewitnesses testified in open court. Why hold a trial when evidence secretly adduced is counted on to sustain a conviction?

Mr. Justice Frankfurter clearly described the unfairness of handicapping a defendant at trial with a finding against him which he did not have an adequate opportunity of resisting.

> It would not be fair, if in the court in which the accused can contest for the first time the validity of the charge against him, he comes handicapped with a finding against him which he did not have an adequate opportunity of resisting. *In Re Oliver, supra,* pp. 284-285.

Now, criminal defendants all over this country are coming to trial handicapped with having to face substan-

tive evidence previously adduced by the prosecution at secret grand jury proceedings. The prosecution coerces the eyewitnesses to appear before the grand jury; the prosecution coerces the eyewitnesses to testify before the grand jury; the prosecution elicits inculpatory testimony from the eyewitnessses at the secret grand jury proceeding; and such testimony is introduced as substantive evidence at trial!

Mr. Justice Brennan and Mr. Justice Marshall, concurring in *Richmond Newspapers, Inc.*, v. *Virginia*, ___ U. S. ___, 65 L. Ed. 2d 973 (July 2, 1980), clearly describe the assurance that open trials offer the public as opposed to private and secret examination.

> open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination . . . where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal. *Id.*, p. ___, 65 L. Ed. 2d p. 1003.

In the present case as in cases all over the country, evidence which has never seen the light of day, "*viva voce*," is being substantively introduced to support criminal convictions. This Court has not yet decided but should decide whether the subtantive use of such evidence abridges a defendant's right to an open and public trial.

Mr. Justice Blackman, Mr. Justice Brennan, Mr. Justice White, and Mr. Justice Marshall, concurring in part and dissenting in part in *Gannett Co., Inc.* v. *De-*

Pasquale, 443 U. S. 368 (1979), have stated the long-range maleffect of secret proceedings is to undermine confidence in the appearance of justice.

> Secret hearings—though they be scrupulously fair in reality—are suspect by nature. Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public. . . . Anything that impairs the open nature of judicial proceedings threatens to undermine this confidence and to impede the ability of the courts to function. *Id.,* p. 429.

Although the ill in *Gannett* was secret "judicial decisions" and the instant ill is secretly manufactured "substantive evidence" both can be cured by adherence to the same constitutional protection: open and public trial.

Those who advocate the substantive use at trial of evidence secretly obtained argue that the witness ratified under oath at the secret proceeding, is subject to perjury charges, has a chance to testify at trial, is available for cross-examination at trial, and the jury may observe his demeanor as he testifies. Against all these checks, the clear notice of Jeremy Bentham over 120-years ago still rings louder and truer.

> Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality,

as checks only in appearance. *In Re Oliver, supra,* p. 271.

The "checks" of oath, testimony and cross-examination at trial are but "cloaks" for the one-sided nature of secret grand jury examination. So long as secretly obtained evidence is used substantively at trial to convict, whatever checks may exist are insufficient. So long as secretly obtained evidence is used substantively, the Sixth Amendment guarantee of open trial is defeated.

In the present case, the sledgehammer substantive use of grand jury eyewitness testimony wrongly resulted in petitioner's conviction. This question has not been but should be considered by this Court.

4. Did the court of appeals err by failing to address the introduction-of-prior-inconsistent-statements issue in affirming petitioner's conviction where 1) prior inconsistent statements were not disclosed at the time the witnesses testified contrary to 18 U.S.C. § 3500, 2) the statements were introduced under Federal Rule of Evidence 613(b) contrary to that rule's foundation requirement, and 3) the statements were admitted in flagrant violation of previous rulings of this Court and other circuits so that review should be granted to exercise the supervisory power of this Court?

The Jencks Act, 18 U.S.C. § 3500, and holdings of this Court construing the Jencks Act such as *Goldberg* v. *United States,* 425 U. S. 94 (1976) and *Campbell* v. *United States,* 365 U. S. 85 (1961) mak it clear that witness statements to the F.B.I. are producible at the time the witness testifies so that confrontation of the

witness shall not be denied. In the present case, extremely inculpatory statements of two eyewitnesses were introduced through an F.B.I. agent long after the witnesses had testified and departed. The statements summarized the prosecution's theory of the case and added inculpatory information not otherwise proven at trial.

The prosecutor admitted that these statements were not disclosed when the witnesses were available as required by the Jencks Act.

> Just from a factual standpoint, the bottom line, no, I did not give counsel the actual copies of the signed statements which I will just show to you here, Your Honor. [Transcript of Evidence, Vol. XXI, p. 213.]

When the prosecutor finally did disclose the damaging statements to the defense, the witnesses were not recalled for examination on the statements. Due to the clear Jencks Act violation, cross-examination of the eyewitnesses was denied. The eyewitnesses may well have been able to diminish the obviously great impact of the F.B.I. agent's testimony on the statements; no one can now calculate whether the Jenck's material could have been used effectively at trial. This Court has declared that "the harmless-error doctrine must be strictly applied in Jencks Act cases." *Goldberg, supra,* 425 U. S. at 111, n. 21.

In addition to the Jencks violation, the prior inconsistent statements were introduced in violation of the foundation requirement of Federal Rule of Evidence

613(b) as well as in conflict with rulings of other circuits and the familiar foundation requirements traditionally approved by this Court. The language of Rule 613(b) requires that the witness be "afforded an opportunity to explain or deny" the statement and that the opposite party be "afforded an opportunity to interrogate" the witness on the statement. The language of this rule was clearly violated in the present case.

The construction of Rule 613(b) by other circuits clearly conflicts with the failure of the court of appeals to address this issue when raised. The Fifth Circuit for instance, in *United States* v. *Rice,* 550 F. 2d 1364 (5th Cir. 1977), cert. den. 434 U.S. 954, clearly states that before a statement is admissible under Rule 613(b) three criteria must be met, including "The witness must be afforded an opportunity to explain or deny the statement; and The opposing party must be afforded an opportunity to interrogate the witness concerning the statement." *Id.,* p. 1374. *Accord, Hilyer* v. *Howat Concrete Co., Inc.,* 578 F. 2d 422, 427 (D.C. Cir. 1978). The construction of Rule 613(b) by other circuit courts was clearly not followed in the present case. As a result of the eyewitnesses' unavailability, the foundation requirement of Rule 613(b) was clearly violated.

The importance of this foundation requirement traditionally has been emphasized by this Court in such cases as *Conrad* v. *Griffey,* 16 Howard 46 (1853), and *Steamboat Charles Morgan* v. *Kouns,* 115 U. S. 69, 77 (1885). In the latter case, this court held:

> The rule is, that the contradictory declarations of a witness, whether oral or in writing, made at another time, cannot be used for the purpose of impeachment until the witness has been examined upon the subject, and his attention particularly directed to the circumstances in such a way as to give him full opportunity for explanation or exculpation, if he desires to make it. *Id.*, p. 77.

This familiar foundation requirement "is preserved" by Rule 613(b). *See,* Rule 613: Notes of Advisory Committee on Proposed Rules, Note on Subdivision (b).

It is respectfully submitted that the introduction of thoroughly damaging prior inconsistent eyewitness statements through an F.B.I. agent in violation of the Jencks Act and Jencks cases, in violation of the foundation requirement of Rule 613(b) as construed by other circuits, and in violation of the familiar foundation requirements traditionally announced by this Court, constitutes such a clear departure from the accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

5. Did the court of appeals err by failing to address the statutory vagueness issue in affirming petitioner's conviction where 1) the language of the Federal Water Pollution Control Act enforcement statute (33 U.S.C. § 1319) is so vague that a person of reasonable intelligence could not foresee imposition of a criminal penalty prior to the issuance of a compliance order or the inception of a civil action, 2) this Court has repeatedly held that one is not to be subjected to a penalty unless the words of the statute plainly impose it, and 3) imposition of the criminal penalty in this case violates petitioner's Sixth and Fifth Amendment rights to notice and due process, so that review should be granted to settle the question of vagueness in this statute?

On appeal, the question of statutory vagueness in the enforcement provisions of the Federal Water Pollution Control Act, 33 U.S.C. § 1319, was raised but was not addressed by the court of appeals. The court of appeals' failure to grant relief as to this issue ignores prior decisions of this Court, so that review should be granted.

This Court has held that "one is not to be subjected to a penalty unless the words of the statute plainly impose it." *United States* v. *Campos-Serrano,* 404 U. S. 293, 297 (1971). This Court has stated that,

> Penal statutes are construed narrowly to insure that no individual is convicted unless "a fair warning has first been given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Mourning* v. *Family Publications Service, Inc.,* 411 U. S. 356, 375 (1973).

In the present case, "fair warning" of criminal penalty has not been given to the world, so that imposition of the criminal penalty abridges constitutional guaranties of notice and due process.

The enforcement statute, 33 U.S.C. § 1319, provides for civil penalties (section d) and criminal penalties (section c), but states in section (a) that any violation must result in either the issuance of a compliance order or the inception of a civil action (i.e., not a criminal action).

> Whenever on the basis of any information available to him, the Administrator finds that any person is in violation of Section 1311, 1312, 1316, 1317, or 1318 of this title, . . . he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section. [33 U.S.C. § 1319(a)(3).]

To the man of common intelligence, this language does not provide for a criminal penalty for a violation. This language warns of either a compliance order or a civil action.

In addition to vague statutory language, conflicting legislative history underscores petitioner's view that the enforcement statute is unconstitutionally vague.

> There is conflicting legislative history with respect to whether a compliance order or a civil suit by the Administrator should be a prerequisite to the Government's institution of criminal proceed-

> ings under § 1319(c). *United States* v. *Frezzo Brothers, Inc.*, 602 F. 2d 1123, 1126 (3rd Cir. 1979), cert. den. 444 U. S. 1074 (1980).

In addition to vague statutory language and conflicting legislative history, the first circuit court decision to consider and decide the applicability of a criminal penalty under 33 U.S.C. § 1319 was not decided until over two-years after the offense alleged in petitioner's indictment. The viable issue decided in *Frezzo, supra,* was:

> Whether the Government may pursue the criminal remedies under the Act before instituting a civil action or before giving written notice of the alleged violation is the prinicpal issue presented in this appeal. *Id.*, p. 1124.

The very fact that the issue of applicability of any criminal penalty under § 1319 was still a viable issue in a federal circuit court as late as 1979 underscores petitioner's view that the enforcement statute is now unconstitutionally vague and certainly was when he was indicted in 1977.

In addition, the enforcement statute provides a standard of *negligent* violation for both civil *and* criminal penalty sections. This in itself is vague, because one wouldn't forsee a criminal penalty for a negligent act, especially where identical conduct could be civilly punished.

It is respectfully submitted that in this day of national concern with environment and pollution, review should be granted by this Court to decide the constitutionality of the criminal enforcement provisions of the Federal Water Pollution Control Act.

CONCLUSION

Because petitioner's case is the first jury conviction under the criminal provisions of the Federal Water Pollution Control Act, because this Act has such national prominence, because the questions presented in this petition are so significant legally and historically, and because the court of appeals has erred so flagrantly, it is respectfully submitted that review should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 79-5339

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

DONALD E. DISTLER, - - - *Defendant-Appellant.*

On Appeal from the United States District Court for the Western District of Kentucky at Louisville.

Decided and Filed February 12, 1981.

Before: EDWARDS, Chief Circuit Judge; BROWN and KENNEDY, Circuit Judges.

BROWN, Circuit Judge. Appellant, Donald E. Distler, was convicted after a jury trial in the Western District of Kentucky of two violations of the Federal Water Pollution Control Act (33 U.S.C. § 1251 *et seq.*). Criminal penalties are imposed by 33 U.S.C. § 1319, which provides in part:

> (c)(1) Any person who willfully or negligently violates section 1311, 1312, 1316, 1317, or 1318 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State or in a permit issued under section 1344 of this title

> by a State, shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. . . .

33 U.S.C. § 1319 (1977).[1] In this appeal appellant presents several issues for review including challenges to certain evidentiary rulings made at trial, a challenge to the constitutionality of Fed.R.Evid. 801(d)(1), and a contention that the evidence offered at trial was insufficient to sustain a verdict of guilt. For the reasons expressed below, we affirm appellant's conviction in all respects.

I.

The pollutants involved in this case are hexachlorocyclopentadiene (hexa), octachlorocyclopentene (octa), and hexachlorobenzene (HCB). Appellant was convicted of discharging a mixture of these pollutants, called PCL bottoms, into the Ohio River, by way of the sewers of the Louisville and Jefferson County Metropolitan Sewer District (MSD).

PCL Bottoms

Hexa, a chlorinated hydrocarbon, is an intermediary product used in the production of other chemical compounds, including pesticides and flame retardant resins. Commercial hexa is produced in batches, which have as a byproduct waste chemicals called PCL bottoms. PCL bot-

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[1]Section 1319 is the criminal enforcement section of portions of the Federal Water Pollution Control Act (33 U.S.C. § 1251 *et seq.*). The specific sections that appellant was convicted of violating, 33 U.S.C. §§ 1311 and 1317, provide authority for the Administrator of the Environmental Protection Agency to establish guidelines for the disposal of pollutants. Failure to follow the guidelines established pursuant to those sections results in the imposition of criminal penalties pursuant to Section 1319.

toms are comprised of a combination of approximately 10-15% hexa, 30% octa, 5% HCB, and a variety of miscellaneous polymers. During the time period relevant to the indictment, the Velsicol Chemical Corporation (Velsicol) plant in Memphis was the only manufacturer in the United States of hexa, and therefore the only source of PCL bottoms, the chemical waste associated with its production.

PCL bottoms do not mix with water and are heavier than water. If they are placed in water, a very small amount rises to the surface, while the great bulk of the material remains at the bottom. The portion exposed to the air volatilizes, emitting a distinctive odor, and in some instances, a haze. If volatilized, PCL bottoms cause eye and skin disorders similar to those caused by tear gas.

Because of the propensity of PCL bottoms to solidify at normal temperatures, these waste chemicals were kept in suspension for transportation by mixing them with a Number 4 grade fuel oil. The Number 4 grade oil, not normally refined directly, was produced by mixing a metered quantity of light cycle Number 2 grade oil, similar to kerosene, with an estimated quantity of heavier Number 6 grade oil. Because no two estimates of the quantity of Number 6 grade oil needed to complete the mixture were the same, each tankerload of PCL bottoms contained a unique blend of oils.

Closedown of the Morris Forman Wastewater Treatment Plant

Beginning in mid-March, 1977, employees of MSD's Morris Forman Wastewater Treatment Plant (Morris Forman Plant) began complaining of a variety of physical ailments caused by particularly noxious fumes and odors. These complaints came predominantly from employees working in the Screen and Grit Building. This building contains four rectangular tanks, known as grit chambers, which are

equipped with a series of screens that strain sewage as it enters the plant.

During the week of March 21, 1977, maintenance crews complained of chemical fumes that burned their eyes, noses, throats, and skin. On March 25, a crew directed to clean grit chamber three removed the water from the chamber, and the fumes problem became worse. Attached to the walls of the chamber was a very thick, viscid, brownish residue. Noxious fumes frustrated efforts to clean the chamber with water and steam.

After the plant manager was notified of the problems in the grit chamber on March 27, 1977, a sample of the residue was taken from the chamber and sent to the Environmental Protection Agency (EPA) lab in Athens, Georgia. Tests performed there revealed the presence of hexa and octa. Velsicol's Memphis plant manager came to Louisville on March 29, 1977, and confirmed that the material in the grit chamber was "hex bottom." A sample of this substance, sample #1110 (MFP), was later introduced in appellant's trial.

Because of the toxicity of PCL bottoms, the plant was essentially abandoned in late March, and virtually all the sewage normally entering it passed untreated into the Ohio River. Between March 29, 1977 and June 8, 1977, approximately 100 million gallons of untreated sewage passed into the Ohio River daily.

The only firm receiving PCL bottoms after mid-1976 that had any direct relationship to the Louisville area was the Chem-Dyne Corporation of Hamilton, Ohio (Chem-Dyne), near Cincinnati, which was under contract to Velsicol to transport its PCL bottoms to Canada for disposal. Review of available shipment records revealed that Chem-Dyne delivered PCL bottoms to Kentucky Liquid Recycling, Inc.

Kentucky Liquid Recycling, Inc.

Kentucky Liquid Recycling, Inc. (KLR), a liquid waste disposal company, was incorporated in Kentucky on August 17, 1976. Appellant was the sole shareholder and sole member of the board of directors. Appellant was also the registered agent for service of process, and the principal office of KLR was appellant's home.

In late August, 1976, appellant contacted the Kentucky Department of Natural Resources to determine what permits were required in order to operate a liquid waste disposal company. In Louisville, on September 16, 1976, appellant leased portions of a Rowan Street warehouse, and in early March, 1977 he leased a brickyard. During this time, appellant also began operating a former Amoco tank farm, located in nearby New Albany, Indiana. KLR generated operating funds by accepting and hauling waste materials and by the sale of some of the drums and their contents.

From December, 1976, through April, 1977, Chem-Dyne was the exclusive transporter of Velsicol PCL bottoms. In late 1976 or early 1977, Chem-Dyne personnel came to Louisville to discuss the disposal of PCL bottoms with appellant. KLR's incinerator designer was informed of various aspects of PCL bottoms incineration, and he was questioned about the ability of the proposed KLR incinerator to adequately accomplish the task. Appellant was provided with a description of the various chemicals included in the Velsicol waste product and was given material data safety sheet that described the toxic properties of those chemicals.

In February, 1977, it was agreed that KLR would store the PCL bottoms in tanks until the incinerator was operational and the required permits were obtained. If KLR did not obtain the required permits within six months, or if

Chem-Dyne's customer, Velsicol, did not approve of KLR,[2] then Chem-Dyne would remove the material.

Shipment of PCL Bottoms from Velsicol to KLR

To stabilize the PCL bottoms for shipment, Chem-Dyne drivers would pick up a PCL bottoms tanker, proceed to the Delta Oil Refinery in Memphis, and take on a load of Number 4 grade oil. The full tankers would then be delivered to KLR in Louisville. At some later time, the Chem-Dyne drivers would pick up the empty tankers, either at the New Albany site, or at a Holiday Inn on Dixie Highway, near Louisville. Chem-Dyne tankers were shiny metallic or stainless steel in color or finish and were shaped either as straight tubes or with a V-shaped drop in the middle. These were easily distinguishable from appellant's tractor tanker, which consisted of a blue Autocar truck tractor and an orange-red straight tube tanker.

Location of the Source of the Contaminant

Between approximately March 29 and April 4, 1977, officials attempted to ascertain the location at which the toxic contaminant was introduced into the MSD sewer system, utilizing a trace procedure that combined sniff searching and actual sampling. Officials collected samples from the major trunk lines feeding into the Morris Forman Plant in their attempt to identify the contaminated lines. They concluded that the principal point of introduction of the contaminant into the sewer was within two or three blocks of the 28th Street and Broadway intersection in Louisville.

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[2]Velsicol had no knowledge of Chem-Dyne's contract with KLR to dispose of PCL bottoms until some time after the dumping incident.

Investigation of KLR

In early April, KLR was investigated in the attempt to discover how the PCL bottoms could have entered the sewer system. On April 4, 1977, personnel from the EPA and other administrative agencies visited those properties known to be owned or controlled by KLR.

Random sampling of these sites revealed some drums with significant concentration values of hexa. Investigation of appellant's Rowan Street warehouse revealed about 5,000 stacked drums, some of which bore Chem-Dyne markings. At the KLR site in New Albany, EPA personnel took samples from each of the ten tanks. Sample #1257 (KLR 1), was taken from Tank #6, and was later introduced in evidence at appellant's trial.

After the FBI entered the case, search warrants were obtained for all the sites inspected by the EPA as well as for the Hardin County brickyard leased by appellant and the farm site on the Dixie Highway owned by appellant's father. These warrants were executed between April 15 and 17, 1977. The searches revealed large quantities of chemicals on each site, including hexa, octa, and HCB in degrees of concentration ranging from "trace amounts" to "significant concentrations." On April 15, 1977, sample #1785 (KLR 2) was taken from Tank #6 at the New Albany site, and was later introduced in evidence during appellant's trial.

Lewis Avenue Investigation

On April 17, 1977, the EPA and the FBI received information that a demolition site contiguous to the intersection of 28th Street and Broadway might be the place where the toxic contaminants were dumped into the sewer. The demolition site was surrounded by fence, with access

to the area available only through a gate adjacent to an oil storage tank area.

Upon arriving at the site, investigators were shown three manholes on Lewis Avenue. Samples were taken from manholes 3, 4, and 5. The samples from manhole 5 showed no trace of hexa or octa. The samples from manhole 4 showed the presence of some hexa and octa, and the samples taken from manhole 5 were "hot." One of the samples from manhole 3, sample #1872 (Lewis), was later introduced in evidence during appellant's trial.

II.

Appellant makes two challenges to the admission of grand jury testimony at his trial. First, appellant argues that some of the grand jury testimony was not "inconsistent" with the trial testimony, and was thus erroneously submitted to the jury as substantive evidence of guilt under Fed.R.Evid. 801 (d)(1)(A). Rule 801(d)(1) provides:

> (d) A statement is not hearsay if —
>
> (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; . . .

Second, appellant argues that allowing any grand jury testimony to be considered as substantive evidence of guilt vio-

lates his Sixth Amendment right to an "open trial" and violates his due process right not to be convicted on the basis of unreliable evidence.[3]

The eyewitnesses who testified at appellant's trial were predominantly associated with Highway Wrecking Co., which was carrying on the demolition at the site that we have referred to. This concern was operated by Frank Hornung, who happened to be a close friend of appellant. The eyewitnesses, who testified at appellant's trial in late 1978, had also testified before the grand jury in mid-1977. During the one and one-half year hiatus between the grand jury proceedings and appellant's trial many of the witnesses forgot portions of their grand jury testimony or remembered it with less certainty of detail. Accordingly, much of the grand jury testimony was introduced in evidence at appellant's trial and was considered by the jury as substantive evidence of guilt in accordance with Fed.R.Evid. 801(d)(1).

With regard to appellant's assertion that some of the grand jury testimony was erroneously admitted under Rule 801(d)(1)(A) because it was not inconsistent with in-court testimony, our review of the record convinces us that the trial court did not abuse its discretion when it admitted the challenged grand jury testimony. We think it clear that, for purposes of this rule, partial or vague recollection is inconsistent with total or definite recollection. Thus, when a witness remembers events incompletely, or with some equivocation at trial, it is not improper to admit a prior statement that otherwise complies with the limitations of Rule 801 (d)(1), if that prior statement indicates that at

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[3]This is essentially a Confrontation Clause challenge, as appellant's main argument against the use of grand jury testimony is that it is unreliable because before the grand jury "leading questions and hearsay are permitted; confrontation is not." Appellant's Brief at 49.

an earlier time the witness remembered the events about which he testified with more certainty or in more detail. In such a case, it may well be that some of the prior testimony corroborates the in-court testimony. The admission of this evidence, however, is not error if, as is the case here, the prior statements are predominantly inconsistent with the in-court statements, and the corroborative portions are needed to set the whole in context. Determinations such as these are properly left to the discretion of the trial court, and that discretion was not abused here.

In addition, we note that much of the grand jury testimony introduced at trial involved prior statements concerning identification, and was properly admissible under subsection (C) of Rule 801(d)(1), which contains no inconsistency requirement.

With regard to the consideration of appellant's constitutional challenge to the admission of grand jury testimony as substantive evidence of guilt, a review of the legislative history that preceded the adoption of Rule 801(d)(1)(A) is helpful. The Rule as originally submitted to Congress by the Supreme Court, as the House of Representatives noted in its Report, would have allowed *any* prior inconsistent statement to be considered as substantive evidence of guilt by the trier of fact, "an approach followed by a small but growing number of jurisdictions and recently held constitutional in *California* v. *Green*, 399 U. S. 149 (1970)." H.R. No. 93-650, 93rd Cong., 2nd Sess., Note to Rule 801(d)(1), *reprinted in* [1974] 4 U. S. Code Cong. & Ad. News 7086. The House amended the Rule, limiting the admissibility of prior inconsistent statements under the Rule to "those made while the declarant was subject to cross-examination at a trial or hearing or in a deposition." *Id.* at 7087.

The Senate rejected the House amendment as too restrictive, opining that since the Rule is operative only if the declarant testifies at trial, at which time he may be cross-

examined, the requirement of cross-examination at the time the original statement is made is unnecessary. The Senate emphasized the benefits of the rule allowing the jury to consider testimony given "nearer in time to the events, when memory was fresher and intervening influence had not been brought into play." S.Rep.No. 93-1277, 93rd Cong., 2nd Sess., Note on Rule 801(d)(1)(A), *reprinted in* [1974] 4 U. S. Code Cong. & Ad. News 7062-63.

The version of Rule 801(d)(1)(A) that was eventually adopted resulted from the efforts of a joint House and Senate committee. In its report, the joint committee stated that "[t]he rule as adopted covers statements before a grand jury." Conference Report No. 93-1597, 93rd Cong., 2nd Sess., Note on Rule 801(d)(1)(A), *reprinted in* [1974] 4 U. S. Code Cong. & Ad. News 7104.

The opinion referred to in the House Report, *California v. Green*, 399 U. S. 140 (1970), is also instructive at this point. In *Green*, the Supreme Court held that the admission, as substantive evidence of guilt, of prior inconsistent statements is not violative of the Confrontation Clause as long as the declarant testifies, and is subject to cross-examination, at trial. The Court identified three protections furthered by the confrontation requirement: to insure that the witness testifies under oath; to allow cross-examination of the witness; and, to provide the jury with the opportunity to observe the demeanor of the witness as he testifies. *Id.* at 158. Although it noted that these protections may be absent with regard to an out-of-court statement, the Court stated that "if the declarant testifies at trial, the out-of-court statement for all practical purposes regains most of the lost protections." *Id.* Because of this, the Court noted that there is "little reason to distinguish among prior inconsistent statements on the basis of the circumstances under which the prior statements were given." *Id.* at 168.

We think it clear that the admission, as substantive evidence, of grand jury testimony that meets the requirements of Rule 801 (d)(1)(A) does not run afoul of the Constitution. The Rule was expressly formulated to allow admission of grand jury testimony, and this court and others have held that grand jury testimony admitted under the Rule may properly be considered as substantive evidence of guilt. *See e.g., United States* v. *Woods,* 613 F. 2d 629, 637 (6th Cir.), *cert. denied,* ____ U. S. ____, 66 L. Ed. 2d 99 (1980); *United States* v. *Mosley,* 555 F. 2d 191, 193 (8th Cir. 1977), *cert. denied,* 434 U. S. 851 (1978); *United States* v. *Castro-Ayon,* 537 F. 2d 1055, 1057 (9th Cir.), *cert. denied,* 429 U. S. 983 (1976).

The Court in *Green, supra,* indicated that, as long as the declarant testifies at trial, the circumstances surrounding the rendering of the initial statement are of little import. Indeed, the rule as submitted by the Court contained no restrictions on the character of prior inconsistent statements that would have been admissible. The Rule in its present form contains more protections than the version submitted by the Court, and contains more restrictions than the language of *Green, supra,* would seem to indicate is necessary.

In any event, the protections furthered by the confrontation requirement, as enunciated by the Court in *Green, supra,* are adequately served by Rule 801(d)(1)(A). The declarant must testify at trial; he must be subject to cross-examination concerning the statement; and, the statement must have been given under oath. Thus, we find no merit to appellant's constitutional challenge to the validity of Rule 801(d)(1)(A).

III.

Appellant also contends on this appeal that expert testimony indicating that samples taken from the KLR site, the

Lewis Avenue manhole, and the MFP grit chamber came from the same source was improperly admitted. In support of this contention, appellant argues that this expert testimony fails to satisfy the standard adopted by this court in *United State* v. *Brown*, 557 F. 2d 541 (6th Cir. 1977). In *Brown*, this court stated:

> Four factors must appear in the record to uphold the admission of expert testimony: 1. qualified expert; 2. proper subject; 3. conformity to a generally accepted explanatory theory; and 4. probative value compared to prejudicial effect.

Id. at 556. Specifically, appellant argues that the expert testimony introduced with regard to oil matching has not gained general acceptance in its scientific field.

Oil spill identification, or oil matching, may be accomplished utilizing various test procedures, some of which are discussed below. Experts in oil matching refer to a four-category system when they express their results: match; possible match; indeterminate; and, non-match. It is important to note at this juncture that the expert testimony in this case regarding comparisons of various samples refers to the matching of the oil that was mixed with the PCL bottoms for transportation and not to a matching *per se* of the PCL bottoms themselves.

The matching of oil samples is made possible because of the unique characteristics of crude oil. Oil is formed when biological matter is trapped underground and is subjected to heat and pressure for a period of time. In each underground pocket, different ratios of plant and animal matter are present, and the oil eventually produced from this combination is unique. This uniqueness enables experts to distinguish oil samples, even as between two samples taken from adjacent pockets within the same geological formation. The refined oil retains its unique character.

The methodology of oil matching involves the isolation of the molecular compounds associated with oil, particularly hydrocarbons and sulphur compounds. Instrumental in this process is the gas chromatograph, which is essentially an extremely sensitive filtering machine. The particular sample to be tested is mixed with a liquid solvent. The mixture is heated until it forms a gas. The gas is then forced through a column, which is a glass tube filled with special filtration material. Each molecular compound will elute through a given column and temperature at the same rate. At the outgoing end of the column a detector is attached, which records the quantity and concentration of each particular molecular compound contained in the sample. The data thus accumulated are converted into electrical impulses, which are recorded in graph fashion, called chromatograms. Comparison of the graphs reveals whether the tested samples match.

EPA chemist Frank Allen tested the two KLR samples, the Lewis sample, and the MFP sample using the gas chromatograph in conjunction with two different types of detectors, one specific for hydrocarbons (FID) and one specific for sulphur compounds (FPD).[4] Allen concluded on the basis of independent analyses of FID and FPD data that the four samples came from the same source.

Dr. Alan Bentz, a research chemist with extensive expertise in the area of oil matching, found, on the basis of FID data, that the four samples came from the same source. At trial he interpreted the FPD chromatograms of the MFP samples and the KLR 1 sample, concluding that this data indicated that the two samples matched. In Dr. Bentz' opin-

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[4]FID is the abbreviation for flame ionization detector and FPD for flame photometric detector. The FPD is 100 times as sensitive as the FID. Although these two detectors reveal results that are independently reliable, they may be attached to the column to simultaneously record data as the molecules elute from the column.

ion, the oil samples matched, and the presence of hexa and octa in the samples removed virtually all doubt concerning the common origin of the samples.

An expert in the area of mass spectroscopic analysis, a process that analyzes ions formed by bombarding the molecules that elute from the gas chromatograph, also testified that the KLR 1 and MFP samples matched. In addition, experts in the field of organic analysis, which uses the gas chromatograph and various detectors to identify specific compounds, testified that all four samples matched.

In support of his challenge to the introduction in evidence of this expert testimony, appellant relies on this court's reasoning in *Brown, supra.* At issue in *Brown* was whether the process of ion microprobic analysis was generally accepted in its field as a viable method for comparing human hair samples. The court held that although ion microprobic analysis had obtained a sufficient degree of acceptance in the field of mass spectrometry, the use of this technique in analyzing hair samples was still in the experimental stage.

In its discussion of the basis for the expert testimony introduced in *Brown,* the court noted that no reported cases were found in which testimony based upon microprobic analysis of hair had been admitted, and that the parties had cited no case of any kind in which evidence based upon microprobic analysis had been admitted. The court also noted that the experts who testified in *Brown* admitted that their test results had not been duplicated elsewhere and that they were unable to point to any authority in their field to support their position. Nor was there any published authority to support these experts' opinions concerning the reliability of the tests they performed. The court further noted that in addition to the absence of specific indicia of reliability, there were no absolute standards by which the

accuracy of their measurements could be gauged. 557 F. 2d at 557-58. Thus, the court concluded:

> While it is a truism that every useful new development must have its first day in court, expert testimony on a critical fact relating to guilt or innocence is not admissible unless the principle upon which it is based has attained general acceptance in the scientific community and is not mere speculation or conjecture. We are not convinced, on the present state of the record that ion microprobic analysis of human hair has yet reached the level of general acceptance in its field, or that the experiments conducted in this case have been shown to be sufficiently reliable and accurate, to provide an acceptable basis for expert identification in a criminal trial.

Id. at 558-59.

Reasoning from *Brown*, appellant contends that although the oil matching techniques testified about at trial are not new, the use of these techniques to analyze sewer samples has not reached the level of general acceptance that establishes an acceptable basis for the introduction of expert testimony in a criminal trial.

In *United States* v. *Stifel*, 433 F. 2d 431 (6th Cir. 1970), *cert. denied*, 401 U. S. 983 (1971), this court utilized the oft-quoted standard of general acceptance enunciated in *Frye* v. *United States*, 293 F. 1013 (D.C. App. 1923). Quoting from *Frye* at 1014, this court stated:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to determine. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scien-

> tific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

433 F. 2d at 438. In *United States* v. *Franks*, 511 F. 2d 25 (6th Cir.), *cert. denied*, 422 U.S. 1042 (1975), this court added that "we deem general acceptance as being nearly synonomous with reliability. If a scientific process is reliable, or sufficiently accurate, courts may also deem it 'generally accepted'." *Id.* at 33, n. 12.

We feel it best to discuss the question of whether the oil matching procedures involved in this case are generally accepted in their scientific field in terms of two separate inquiries. First, are the methods utilized in the instant case generally accepted as reliable in the oil matching field in general? Second, if the first question is answered affirmatively, are these methods properly transferable to an analysis of the sewer samples tested in the instant case?

With regard to the first inquiry mentioned above, the court concludes from the record that the methods employed by the experts who testified in the instant case, namely gas chromatograph analysis performed in conjunction with the various detectors, is a generally accepted method of matching oil samples. These methods were shown to be highly reliable, and they have received a significant degree of national and international recognition.

Dr. Bentz testified that tests performed on the FID found it to be reliable in excess of 90%. Similar tests performed on the FPD found it also to be reliable in excess of 90%. Because the results obtained from each detector are independently reliable, when the results of both detectors agree, they are reliable in excess of 99%. Dr. Bentz testified that this high degree of reliability is enhanced when

samples containing oil from the same source also contain the same non-petroleum components.

At least two other courts have found that gas chromatograph/FID/FPD analysis is a highly reliable method of oil fingerprinting. In *United States* v. *Slade*, 447 F. Supp. 638 (E.D. Tex. 1978), the court found that results of oil matching tests conducted with the gas chromatograph and FID and FPD detectors yield oil spill identification results that are reliable "in the neighborhood of 99.7%." *Id.* at 644. The Southern District of Texas reached a similar conclusion in an unreported case. *See id.*, n. 6. *See also* discussion in *Commonwealth of Puerto Rico* v. *SS Zoe Colocotroni*, 456 F. Supp. 1327, 1342-43 (D. P. R. 1978), *aff'd*, 602 F. 2d 12 (1st Cir. 1979).

Further, a standard method of gas chromotograph/FID/FPD analysis has been promulgated by the American Society for Testing and Materials (ASTM).[5] Dr. Bentz testified that the procedures utilized by the experts who testified at appellant's trial did not deviate significantly from the ASTM standard procedure. In addition, domestic and foreign oil concerns have shown confidence in this oil identification procedure.

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[5]In *Application of American Society for Testing Materials*, 231 F. Supp. 686 (E.D. Pa. 1964), ASTM was described by the court as follows:

> ASTM is a non-profit, charitable organization. It writes standards by which building materials and similar matters may be judged. These standards are adopted and relied upon, often without any independent investigation, by those who want to buy materials suited to their purposes. Among those who so rely are municipalities, state governments, and departments of the Federal Government. ASTM has about 12,000 members. Its membership is composed of three categories: producers, consumers, and general interest (academic, etc.). Its specifications are written by technically qualified committees composed of members from the three categories.

Id. at 688.

Having determined that gas chromatograph/FID/FPD analysis is generally accepted in the field of oil matching or oil fingerprinting, we now turn to a consideration of whether this mode of scientific analysis is properly transferable to the samples taken in the instant case. We hold that it is.

Appellant argues that gas chromatograph/FID/FPD analysis is not a generally accepted method of analyzing sewer samples. This argument is wide of the mark, however, because, as the experts in this case testified, the oil with which the PCL bottoms was mixed is the substance that was analyzed. We see no significant difference, and appellant has presented none, between analyzing oil samples taken from the sewer and analyzing oil samples taken from some other source. Non-petroleum elements, whether they be in the sewer or elsewhere in the environmnt, are irrelevant to the comparison of oil samples. In some cases, the non-petroleum elements in the samples enhance the reliability of the conclusion that two samples match, but nothing in the record indicates that the non-petroleum elements detract in any way from the reliability of the analysis of the oil samples. Thus, we hold that the expert testimony introduced in this case satisfies the four-part *Brown* test for admissibiilty.

IV.

Having determined that the trial court did not err when it admitted expert and grand jury testimony, we now turn to a consideration of appellant's contention that the evidence introduced at trial was insufficient to support a verdict of guilt. When considering a challenge to the sufficiency of the evidence, we must view the totality of evidence, along with all favorable inferences drawn therefrom, in the light most favorable to the government. *United States* v. *Green*, 548 F. 2d 1261, 1266 (6th Cir. 1977). When considered

thusly, it is clear that sufficient evidence was presented to the jury to support its verdict of guilt in the instant case.

Evidence introduced at trial placed appellant, as the alter ego of KLR, in the exclusive chain of possession of PCL bottoms. Eyewitnesses saw him at the dump site on numerous occasions with silver or chrome colored tankers. The inference is clear that these were Chem-Dyne tankers. He was seen washing these tankers out, and on some occasions a hose was seen extending from the tankers into the sewer. This evidence alone would seem to adequately support a verdict of guilt. In addition, however, a substantial amount of convincing expert testimony was introduced. Thus, there was abundant evidence presented to the jury that supports its verdict.

The court has carefully considered the other issues presented on this appeal and finds them without merit. Accordingly, the judgment of conviction of appellant for violations of the Federal Water Pollution and Control Act is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 79-5339

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

DONALD E. DISTLER, - - - *Defendant-Appellant.*

ORDER — Filed March 31, 1981

Before: EDWARDS, Chief Circuit Judge; BROWN and KENNEDY, Circuit Judges.

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above styled case; and

No judge in active service in this court having moved for rehearing en banc and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the court's opinion;

Now, therefore, it is Ordered that the motion for rehearing be and the same is hereby denied.

Entered by Order of the Court.

(s) John P. Hehman, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 79-5339

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

DONALD E. DISTLER, - - - *Defendant-Appellant.*

ORDER STAYING MANDATE—Filed April 22, 1981

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

Entered by Order of the Court.

(s) John P. Hehman, Clerk

APPENDIX D

STATUTORY PROVISIONS

18 U.S.C. § 3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of

the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

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33 U.S.C. § 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law. Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 USCS §§1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives. In order to carry out the objective of this Act there shall be achieved—

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best praticable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act [33 USCS § 1314(b)], or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 307 of this Act [33 USCS § 1317]; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 203 of this Act [33 USCS § 1283] prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 304(d)(1) of this Act [33 USCS § 1314(d)(1)]; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 510 [33 USCS § 1370]) or any other Federal law or

regulation, or required to implement any applicable water quality standard established pursuant to this Act.

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act [33 USCS § 1314(b)(2)], which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 315 [33 USCS § 1325]), that such elimination is technicologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act [33 USCS § 1314(b)(2)], or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 307 of this Act [33 USCS § 1317];

(B) not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements set forth in section 201(g)(2)(A) of this Act [33 USCS § 1281(g)(2)(A)];

(C) not later than July 1, 1984, with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of the paragraph;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 307 of this Act [33 USCS § 1317(a)] which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph not later than three years after the date such limitations are established;

(E) not later than July 1, 1984, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 304(a)(4) of this Act [33 USCS § 1314(a)(4)] shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 304 (b)(4) of this Act [33 USCS § 1314(b)(4)]; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph not later than 3 years after the date such limitations are established, or not later than July 1, 1984, whichever is later, but in no case later than July 1, 1987.

(c) Modification of timetable. The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to

the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

(d) Review and revision of effluent limitations. Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

(e) All point discharge source application of effluent limitations. Effluent limitations established pursuant to this section or section 302 of this Act [33 USCS § 1312] shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act.

(f) Illegality of discharge of radiological, chemical, or biological warfare agents or high-level radioactive waste. Notwithstanding any other provisions of this Act it shall be unlawful to discharge any radiological, chemical, or biological warfare or high-level radioactive waste into the navigable waters.

(g) Waiver for certain pollutants. (1) The Administrator, with the concurrence of the State, shall modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge of any pollutant (other than pollutants identified pursuant to section 304(a)(4) of this Act [33 USCS § 1314(a)(4)], toxic pollutants subject to section 307(a) of this Act [33 USCS § 1317(a)], and the thermal component of discharges) from any point source upon a showing by the owner or operator of such point source satisfactory to the Administrator that—

(A) such modified requirements will result at a minimum in compliance with the requirements of subsec-

tion (b)(1)(A) or (C) of this section, whichever is applicable;

(B) such modified requirements will not result in any additional requirements on any other point or non-point source; and

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or syergistic propensities.

(2) If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under susbection (c) of this section with respect to such pollutant only during the same time period as he is eligible to apply for a modification under this subsection.

(h) Modification of secondary treatment requirements. The Administrator, with the concurrence of the State, may issue a permit under section 402 [33 USCS § 1342] which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant in an existing discharge from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that—

(1) there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 304(a)(6) of this Act [33 USCS § 1314(a)(6)];

(2) such modified requirements will not interfere with the attainment or maintenance of that water quality which assures protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife, and allows recreational activities, in and on the water;

(3) the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable;

(4) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(5) all applicable pretreatment requirements for sources introducing waste into such treatment works will be enforced;

(6) to the extent practicable, the applicant has established a schedule of activities designed to eliminate the entrance of toxic pollutants from nonindustrial sources into such treatment works;

(7) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(8) any funds available to the owner of such treatment works under title II of this Act [33 USCS §§ 1281 et seq.] will be used to achieve the degree of effluent reduction required by section 201(b) and (g)(2)(A) [33 USCS § 1281(b), (g)(2)(A)] or to carry out the requirements of this subsection.

For the purposes of this subsection the phrase "the discharge of any pollutant into marine waters" refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 101(a)(2) of this Act [33 USCS § 1251(a)(2)].

(i) Municipal time extensions. (1) Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) or (b)(1)(C) of this section, but (A) construction cannot be completed within the time required in such subsection, or (B) the United States has failed to make financial assistance under this Act available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may request the Administrator (or if appropriate the State) to issue a permit pursuant to section 402 of this Act [33 USCS § 1342] or to modify a permit issued pursuant to that section to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after the date of enactment of this subsection [enacted Dec. 27, 1977]. The Administrator (or if appropriate the State) may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1983, and shall contain such other terms and conditions, including those necessary to carry out subsection (b) through (g) or section 201 of

this Act [33 USCS § 1281(b)-(g)], section 307 of this Act [33 USCS § 1317], and such interim effluent limitations applicable to that treatment works as the Administrator determines are necessary to carry out the provisions of this Act.

(2)(A) Where a point source (other than a publicly owned treatment works) will not achieve the requirements of subsections (b)(1)(A) and (b)(1)(C) of this section and—

(i) if a permit issued prior to July 1, 1977, to such point source is based upon a discharge into a publicly owned treatment works; or

(ii) if such point source (other than a publicly owned treatment works) had before July 1, 1977, a contract (enforceable against such point source) to discharge into a publicly owned treatment works; or

(iii) if either an application made before July 1, 1977, for a construction grant under this Act for a publicly owned treatment works, or engineering or architectural plans or working drawings made before July 1, 1977, for a publicly owned treatment works, show that such point source was to discharge into such publicly owned treatment works,

and such publicly owned treatment works is presently unable to accept such discharge without construction, and in the case of a discharge to an existing publicly owned treaement works, such treatment works has an extension pursuant to paragraph (1) of this subsection, the owner or operator of such point source may request the Administrator (or if appropriate the State) to issue or modify such a permit pursuant to such section 402 [33 USCS § 1342] to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after the

date of enactment of this subsection [enacted Dec. 27, 1977] or the filing of a request by the appropriate publicly owned treatment works under paragraph (1) of this subsection, whichever is later. If the Administrator (or if appropriate the State) finds that the owner or operator of such point source has acted in good faith, he may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the point source to achieve the requirements of subsections (b)(1)(A) and (C) of this section and shall contain such other terms and conditions, including pretreatment and interim effluent limitations and water conservation requirements applicable to that point source, as the Administrator determines are necessary to carry out the provisions of this Act.

(B) No time modification granted by the Administrator (or if appropriate the State) pursuant to paragraph (2)(A) of this subsection shall extend beyond the earliest date practicable for compliance or beyond the date of any extension granted to the appropriate publicly owned treatment works pursuant to paragraph (1) of this subsection, but in no event shall it extend beyond July 1, 1983; and no such time modification shall be granted unless (i) the publicly owned treatment works will be in operation and available to the point source before July 1, 1983, and will meet the requirements of subsections (b)(1)(B) and (C) of this section after receiving the discharge from that point source; and (ii) the point source and the publicly owned treatment works have entered into an enforceable contract requiring the point source to discharge into the publicly owned treatment works, the owner or operator of such point source to pay the costs required under section 204 of this Act [33 USCS § 1284], and the publicly owned treatment works to accept the dis-

charge from the point source; and (iii) the permit for such point source requires that point source to meet all requirements under section 307(a) and (b) [33 USCS § 1317(a), (b)] during the period of such time modification.

(j) Modification procedures. (1) Any application filed under this section for a modification of the provisions of—

(A) subsection (b)(1)(B) under subsection (h) of this section shall be filed not later than 270 days after the date of enactment of the Clean Water Act of 1977 [enacted Dec. 27, 1977];

(B) subsection (b)(2)(A) as it applies to pollutants identified in subsection (b)(2)(F) shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 304 [33 USCS § 1314] or not later than 270 days after the date of enactment of the Clean Water Act of 1977 [enacted Dec. 27, 1977], whichever is later.

(2) Any application for a modification filed under subsection (g) of this section shall not operate to stay any requirement under this Act, unless in the judgment of the Administrator such a stay or the modification sought will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity, or teratogenicity), or synergistic propensities, and that there is a substantial likelihood that the applicant will succeed on the merits of such application. In the case of an application filed under subsection (g) of this section, the Administrator may condition any stay granted under this paragraph on requiring the filing of

a bond or other appropriate security to assure timely compliance with the requirements from which a modification is sought.

(k) Innovative Technology. In the case of any facility subject to a permit under section 402 [33 USCS § 1342] which proposes to comply with the requirements of subsection (b)(2)(A) of this section by replacing existing production capacity with an innovative production process which will result in an effluent reduction significantly greater than that required by the limitation otherwise applicable to such facility and moves toward the national goal of eliminating the discharge of all pollutants, or with the installation of an innovative control technique that has a substantial likelihood for enabling the facility to comply with the applicable effluent limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation and moves toward the national goal of eliminating the discharge of all pollutants, or by achieving the required reduction with an innovative system that has the potential for significantly lower costs than the systems which have been determined by the Administrator to be ecomonically achievable, the Administrator (or the State with an approved program under section 402 [33 USCS § 1342], in consultation with the Administrator) may establish a date for compliance under subsection (b)(2)(A) of this section no later than July 1, 1987, if it is also determined that such innovative system has the potential for industry-wide application.

(l) Toxic pollutants. The Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 307(a)(1) of this Act [33 USCS § 1317(a)(1)].

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33 U.S.C. § 1317. Toxic and pretreatment effluent standards

(a) Toxic pollutant list; revision; hearing; promulgation of standards; effective date; consultation. (1) On and after the date of enactment of the Clean Water Act of 1977 [enacted Dec. 27, 1977], the list of toxic pollutants or combination of pollutants subject to this Act shall consist of those toxic pollutants listed in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives, and the Administrator shall publish, not later than the thirtieth day after the date of enactment of the Clean Water Act of 1977 [enacted Dec. 27, 1977], that list. From time to time thereafter, the Administrator may revise such list and the Administrator is authorized to add to or remove from such list any pollutant. The Administrator in publishing any revised list, including the addition or removal of any pollutant from such list, shall take into account toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms, and the nature and extent of the effect of the toxic pollutant on such organisms. A determination of the Administrator under this paragraph shall be final except that if, on judicial review, such determination was based on arbitrary and capricious action of the Administrator, the Administrator shall make a redetermination.

(2) Each toxic pollutant listed in accordance with paragraph (1) of this subsection shall be subject to effluent limitations resulting from the application of the best available technology economically achievable for the applicable category or class of point sources established in accordance with sections 301(b)(2)(A) and 304(b)(2) of this Act [33 USCS §§ 1311(b)(2)(A), 1314(b)

(2)]. The Administrator, in his discretion, may publish in the Federal Register a proposed effluent standard (which may include a prohibition) establishing requirements for a toxic pollutant which, if an effluent limitation is applicable to a class or category of point sources, shall be applicable to such category or class only if such standard imposes more stringent requirements. Such published effluent standard (or prohibition) shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms, and the extent to which effective control is being or may be achieved under other regulatory authority. The Administrator shall allow a period of not less than sixty days following publication of any such proposed effluent standard (or prohibition) for written comment by interested persons on such proposed standard. In addition, if within thirty days of publication of any such proposed effluent standard (or prohibition) any interested person so requests, the Administrator shall hold a public hearing in connection therewith. Such a public hearing shall provide an opportunity for oral and written presentations, such cross-examinations as the Administrator determines is appropriate on disputed issues of material fact, and the transcription of a verbatim record which shall be available to the public. After consideration of such comments and any information and material presented at any public hearing held on such proposed standard or prohibition, the Administrator shall promulgate such standard (or prohibition) with such modification as the Administrator finds are justified. Such promulgation by the Administrator shall be made within two hundred and seventy days

after publication of proposed standard (or prohibition). Such standard (or prohibition) shall be final except that if, on judicial review, such standard was not based on substantial evidence, the Administrator shall promulgate a revised standard. Effluent limitations shall be established in accordance with sections 301(b)(2)(A) and 304(b)(2) [33 USCS §§ 1311(b)(2)(A), 1314(b)(2)] for every toxic pollutant referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives as soon as practicable after the date of enactment of the Clean Water Act of 1977 [enacted Dec. 27, 1977], but no later than July 1, 1980. Such effluent limitations or effluent standards (or prohibitions) shall be established for every other toxic pollutant listed under paragraph (1) of this subsection as soon as practicable after it is so listed.

(3) Each such effluent standard (or prohibition) shall be reviewed and, if appropriate, revised at least every three years.

(4) Any effluent standard promulgated under this section shall be at that level which the Administrator determines provides an ample margin of safety.

(5) When proposing or promulgating any effluent standard (or prohibition) under this section, the Administrator shall designate the category or categories of sources to which the effluent standard (or prohibition) shall apply. Any disposal of dredged material may be included in such a category of sources after consultation with the Secretary of the Army.

(6) Any effluent standard (or prohibition) established pursuant to this section shall take effect on such date or dates as specified in the order promulgating such standard, but in no case, more than one year from the date of

such promulgation. If the Administrator determines that compliance within one year from the date of promulgation is technologically infeasible for a category of sources, the Administrator may establish the effective date of the effluent standard (or prohibition) for such category at the earliest date upon which compliance can be feasibly attained by sources within such category, but in no event more than three years after the date of such promulgation.

(7) Prior to publishing any regulations pursuant to this section the Administrator shall, to the maximum extent practicable within the time provided, consult with appropriate advisory committees, States, independent experts, and Federal departments and agencies.

(b) Pretreatment standards; hearing; promulgation; compliance period; revision; application to State and local laws. (1) The Administrator shall, within one hundred and eighty days after the date of enactment of this title [enacted Oct. 18, 1972] and from time to time thereafter. publish proposed regulations establishing pretreatment standards for introduction of pollutants into treatment works (as defined in section 212 of this Act [33 USCS § 1292]) which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works. Not later than ninety days after such publication, and after opportunity for public hearing, the Administrator shall promulgate such pretreatment standards. Pretreatment standards under this subsection shall specify a time for compliance not to exceed three years from the date of promulgation and shall be established to prevent the discharge of any pollutant through treatment works (as defined in section 212 of this Act [33 USCS § 1292])

which are publicly owned, which pollutant interferes with, passes through, or otherwise is incompatible with such works. If, in the case of any toxic pollutant under subsection (a) of this section introduced by a source into a publicly owned treatment works, the treatment by such works removes all or any part of such toxic pollutant and the discharge from such works does not violate that effluent limitation or standard which would be applicable to such toxic pollutant if it were discharged by such source other than through a publicly owned treatment works, and does not prevent sludge use or disposal by such works in accordance with section 405 of this Act [33 USCS § 1345], then the pretreatment requirements for the sources actually discharging such toxic pollutant into such publicly owned treatment works may be revised by the owner or operator of such works to reflect the removal of such toxic pollutant by such works.

(2) The Administrator shall, from time to time, as control technology, processes, operating methods, or other alternatives change, revise such standards following the procedure established by this subsection for promulgation of such standards.

(3) When proposing or promulgating any pretreatment standard under this section, the Administrator shall designate the category or categories of sources to which such standard shall apply.

(4) Nothing in this subsection shall affect any pretreatment requirement established by any State or local law not in conflict with any pretreatment standard established under this subsection.

(c) **New sources of pollutants into publicly owned treatment works.** In order to insure that any source introducing pollutants into a publicly owned treatment

works, which source would be a new source subject to section 306 [33 USCS § 1316] if it were to discharge pollutants, will not cause a violation of the effluent limitations established for any such treatment works, the Administrator shall promulgate pretreatment standards for the category of such sources simultaneously with the promulgation of standards of performance under section 306 [33 USCS § 1316] for the equivalent category of new sources. Such pretreatment standards shall prevent the discharge of any pollutant into such treatment works, which pollutant may interfere with, pass through, or otherwise be incompatible with such works.

(d) Operation in violation of standards unlawful. After the effective date of any effluent standard or prohibition or pretreatment standard promulgated under this section, it shall be unlawful for any owner or operator of any source to operate any source in violation of any such effluent standard or prohibition or pretreatment standard.

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33 U.S.C. § 1319. Enforcement

(a) State enforcement; compliance orders. (1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 301, 302, 306, 307, 308, 318, or 405 of this Act [33 USCS § 1311, 1312, 1316, 1317, 1318, 1328, or 1345] in a permit issued by a State under an approved permit program under section 402 or 404 of this Act [33 USCS § 1342 or 1344], he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate en-

forcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person—

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 301, 302, 306, 307, 308, 318, or 405 of this Act [33 USCS § 1311, 1312, 1316, 1317, 1318, 1328, or 1345], or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act [33 USCS § 1342] by him or by a State or in a permit issued under section 404 of this Act [33 USCS § 1344] by a State, he shall

issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 308 of this Act [33 USCS § 1318] shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5)(A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this Act or in any permit issued under this Act, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve com-

pliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 402 of this Act [33 USCS § 1342] was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 301(b)(1)(A) [33 USCS § 1311(b)(1)(A)] to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 301(b)(1)(A) or (C) of this Act [33 USCS § 1311(b)(1)(A), (C)], (B) that such person cannot meet the requirements for a time extension under section 301(i)(2) of this Act [33 USCS § 1311(i)(2)], and (C) that the most expeditious and appropriate means of compliance with this Act by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this Act at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

(b) Civil actions. The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United

States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c) Criminal penalties. (1) Any person who willfully or negligently violates section 301, 302, 306, 307, or 308 of this Act [33 USCS § 1311, 1312, 1316, 1317, or 1318], or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act [33 USCS § 1342] by the Administrator or by a State or in a permit issued under section 404 of this Act [33 USCS § 1344] by a State, shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Act or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Act, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

(3) For the purposes of this subsection, the term "person" shall mean, in addition to the definition contained in section 502(5) of this Act [33 USCS § 1362(5)], any responsible corporate officer.

(d) Civil penalties. Any person who violates section 301, 302, 306, 307, 308, 318, or 405 of this Act [33 USCS § 1311, 1312, 1316, 1317, 1318, 1328, or 1345], or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act [33 USCS § 1342] by the Administrator, or by a State, or in a permit issued under section 404 of this Act [33 USCS § 1344] by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

(e) State liability for judgments and expenses. Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

(f) Wrongful introduction of pollutants into treatments works. Whenever, on the basis of any information available to him, the Administrator finds that an owner or operator of any source is introducing a pollutant into a treatment works in violation of subsection (d) of section 307 [33 USCS § 1317(d)], the Administrator may notify the owner or operator of such treatment works and the State of such violation. If the owner or operator of the treatment works does not commence appropriate enforcement action within 30 days of the date of such notification, the Administrator may commence a civil action for appropriate relief, including but not limited to, a permanent or temporary

injunction, against the owner or operator of such treatment works. In any such civil action the Administrator shall join the owner or operator of such source as a party to the action. Such action shall be brought in the district court of the United States in the district in which the treatment works is located. Such court shall have jurisdiction to restrain such violation and to require the owner or operator of the treatment works and the owner or operator of the source to take such action as may be necessary to come into compliance with this Act. Notice of commencement of any such action shall be given to the State. Nothing in this subsection shall be construed to limit or prohibit any other authority the Administrator may have under this Act.

* * * * * * *

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No. 80-1986

In the Supreme Court of the United States

OCTOBER TERM, 1980

DONALD E. DISTLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to establish petitioner's guilt.

2. Whether testimony regarding the reliability of certain oil analysis techniques was properly admitted.

3. Whether the grand jury testimony of trial witnesses was properly introduced and treated as substantive evidence pursuant to Fed. R. Evid. 801 (d) (1).

4. Whether testimony by an FBI agent regarding prior statements by two witnesses was properly admitted.

5. Whether the criminal penalties of the Federal Water Pollution Control Act for an unlawful discharge of pollutants and the disruption of a sewage treatment plant are void for vagueness.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 23-42) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1981, and a petition for rehearing was denied on March 31, 1981 (Pet. App. 43). The petition for a writ of certiorari was filed on May 26, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATION INVOLVED

The relevant portions of the Federal Water Pollution Control Act, 33 U.S.C. 1311(a), 1317(c) and (d), and (& Supp. III) 1319, are set forth in the

petition (Pet. App. 47, 62-69). The applicable regulation, 40 C.F.R. 128.131 (1977), is set out in the Appendix, *infra*, 1a.

STATEMENT

From November 9 through December 26, 1978, petitioner and two others, Charles William Horn, Jr., and Joseph Alfred Hess, Jr., were tried on a five count indictment charging conspiracy and substantive offenses relative to toxic chemical discharges into the Louisville, Kentucky, sewer system and into the Ohio River. Counts Four and Five charged petitioner and his co-defendants with discharging pollutants into the Ohio River via the Louisville and Jefferson County Metropolitan Sewer District (MSD) sewer system and interference with the operation of MSD's Morris Forman Wastewater Treatment Plant, in viotion of 33 U.S.C. 1311, 1317, and 1319, and 40 C.F.R. 128.131 (1977).[1] The pollutants involved included hexachlorocyclopentadiene ("hexa"), octachlorocyclopentene ("octa"), and hexachlorobenzene ("HCB"). The defendants were officers or employees of Kentucky Liquid Recycling, Inc. Hess and Horn were acquitted on all counts; petitioner was convicted on Counts Four and Five, and acquitted on the remaining counts.

On September 14, 1979, noting that no defendant who had passed before the bench had "exhibited a more callous and flagrant disregard for the safety and lives of vast numbers of citizens" (Sentencing Tr. 8), the trial judge imposed consecutive sentences

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[1] Counts One and Two charged conspiracy directly related to Counts Four and Five, respectively. Count Three charged petitioner and others unknown to the grand jury with causing the discharge of pollutants into waters of the United States, in violation of 33 U.S.C. 1311 and 1319.

of one year's imprisonment on each count and fined petitioner $25,000 on each count.

The evidence at trial showed that at the Morris Forman Wastewater Treatment Plant in Louisville, employees in the portion of the plant where sewage initially enters the plant began experiencing respiratory, dermatological, and other difficulties in mid-March of 1977. T.T. II 52, 107-108, 132-133. Their problems appeared to be related to the presence in the plant of a thick, oily, brownish residue that smelled like a concentrated weed killer. T.T. II 62. When efforts were made to clean away that material using steam, it gave off vapors that caused workers to leave the area. T.T. II 63, 65-66, 70, 113, 116.

Analysis of the residue disclosed that it was the waste, called "PCL bottoms," from the production of hexa, a chlorinated hydrocarbon used in the production of chemical compounds such as pesticides and flame retardant resins.[2] T.T. II 159-160; VII 65-73, 141, 170. The only domestic manufacturer of hexa was Velsicol Chemical Corporation (T.T. VII 121), which had contracted with Chem-Dyne Corporation to dispose of its PCL bottoms (T.T. VII 183; VII 13-14). The material was mixed with a number 4 grade fuel oil for transportation in tractor trailers of a distinctive appearance. T.T. VII 73, 77-78; VIII 7, 22; IX 226-231. That oil was produced by mixing a specific quantity of a lighter grade oil with an estimated amount of heavier oil, so that each tanker load contained a unique blend of oils. T.T. VII 172-174.

Hexa has a very distinctive odor, and, when vaporized, causes eye and skin irritations comparable to

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[2] PCL bottoms contain greater quantities of octa and HCB than the commercial grade hexa. T.T. VII 66-73, 170.

those caused by tear gas. T.T. VII 97. It is, moreover, highly toxic, and, even in small concentrations, may attack the liver and central nervous system. Accordingly, as soon as the residue was identified, MSD ordered all employees out of the treatment plant and began by-passing virtually all sewage flow directly into the Ohio River. T.T. II 184-185, 180, 16; I 96, 105-112. As a result of the abandonment and by-pass, 90 to 105 million gallons of untreated sewage and pollutants were discharged daily into the Ohio River between March 29 and June 18, 1977. T.T. I 113.

Efforts to identify the source of the toxic contaminants in order to shut off their discharge into the sewer system proceeded along two lines (T.T. III 136): attempts were made both to discover the source of entry of the material into the sewer system, and to discover the source of entry of the material into the Louisville area. By April 4, 1977, these two parallel tracing procedures had led environmental investigators to two locations: (1) a distillery demolition site in Louisville that appeared to be the source of entry of the materials into the sewer system, and (2) the facilities of Kentucky Liquid Recycling, Inc., in New Albany, Indiana (directly across the Ohio River from Louisville).

The tracking of the contaminants through the sewer system involved, first, tracing the hexa odor to an intersection near the demolition site (T.T. II 146), and, second, taking samples from the major trunk lines,[3] analyzing those samples for the contaminants, eliminating those lines not showing con-

[3] Since the PCL bottoms are heavier than water and do not mix with it (T.T. VII 97), they tended to move along the bottoms of the sewers in gooey masses, T.T. XIV 73-75, 140-141, 195-196; XII 15.

tamination, and then working back up the contaminated lines to the point of pollutant introduction. T.T. XII 15; XIV 73-75, 140-141, 195-196. Gradually, the samplers worked their way back to the same area where odor searches had led. T.T. XV 150-152.

The parallel effort, to determine how the contaminants had reached the Louisville area, soon led to Velsicol and Chem-Dyne Corporation. Chem-Dyne's records showed that it had been delivering PCL bottoms to Kentucky Liquid Recycling (KLR). T.T. III 139-140. Therefore, on April 4, personnel from EPA and other administrative agencies visited KLR's facility at New Albany. T.T. III 144; XV 174; XII 60, 176. They were advised that PCL bottoms were being stored in somewhat random fashion in the various tanks on the property (T.T. III 182-183; XXIV 153, 155, 158) pending the completion of an incinerator unit.[4] T.T. XXIV 121, 141-143, 200-201, 236.

The parallel investigations finally converged on a site in western Louisville at which an old distillery was being demolished. The site was next to the street intersection to which the sewer traces had tracked the contaminants, and the demolition work was being done by Frank Hornung, an old friend and business associate of petitioner. Samples from the sewer manholes on the site had the highest con-

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[4] Under the agreement KLR had entered into with Chem-Dyne, KLR was to hold the Velsicol PCL bottoms until such time as the incinerator was in operation and was to dispose of all the chemical wastes it received in accordance with applicable local, state, and federal laws. T.T. VIII 200-201; T.E. US 36. Petitioner had no permit for the operation of any incinerator. T.T. XXVI 165-166, 176-178.

taminant concentration of any sewer samples taken.[5] T.E. US 222A.

At the demolition site FBI agents interviewed Hornung and various laborers employed by him. They learned that petitioner had been seen pulling a distinctive PCL bottoms type tanker with a tractor belonging to KLR (T.T. X 138, 134-136) and that such tankers had been rinsed out on the site while a hose from the underside of a tanker led into the sewer. T.T. X 183-185, 191-192; XI 27-28, 66-73, 77, 92, 99-125. This information, which was also given to the grand jury, was corroborated by the analyses of samples taken at petitioner's New Albany plant, at the demolition site, and at the abandoned treatment plant.

The focal point of the scientific evidence introduced at trial was the oil with which the PCL bottoms were mixed for transportation, which was readily comparable from sample to sample by sophisticated analytical techniques.[6] The presence of the octa mixed with the oil, though, helped to reinforce and confirm the "matches" of samples taken from

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[5] The sewer on the site was a small branch line from the contaminated trunk line, which did not appear on MSD's maps; it had not been investigated earlier because its existence was unknown.

[6] Three separate techniques were employed by EPA chemists: (1) oil matching or oil fingerprinting, (2) compound identification, and (3) mass spectrometry. Each is an independent and distinct technique. The only link among the three is the gas chromatograph, which initially reduces sample materials to discrete molecular components. Thereafter, oil matching, compound identification, and mass spectrometry develop along independent analytical lines. T.T. XVIII 113-114.

the treatment plant, the demolition site, and Tank 6 at the KLR facility.

The conclusion reached by EPA chemists as a result of their analyses of samples from the three locations was that the contaminants from the treatment plant and demolition site had come from the same source as the material in KLR Tank No. 6. T.T. XX(B) 41-51; XIX 55. That same conclusion emerged from each of the different types of analysis performed on the samples. T.T. XXI 80-81, 83-84. Moreover, the same conclusion was reached whether the focal point of analysis was the oil mixed with the chlorinated hydrocarbons or those chemicals themselves. Those conclusions of identical source were based on the uniqueness of each oil blend in each tanker, the uniqueness of each tanker mixture of oil and PCL bottoms, and the uniqueness of the mixture in each KLR storage tank.

ARGUMENT

1. The above summary of the evidence presented in this two-month trial demonstrates that there is no merit to petitioner's claim that there was insufficient evidence to establish his guilt beyond a reasonable doubt (Pet. 5). In sum, the evidence showed that the material that disrupted the operation of the sewage treatment facility came from the same source as the material in KLR's Tank No. 6 (T.T. XX(B) 41-51; XIX 55); that petitioner had been seen driving to the demolition site the unique type of tankers which hauled the PCL bottoms, where they had been seen apparently being drained into the sewer (T.T. IX 112-118, 135, 138, 182-183, 155-156; X 134-136, 149-152, 183-185, 191-192; XI 8-10, 22, 27-28, 66-73, 77-92, 99-125); and that petitioner was receiving PCL bottoms at a rapid rate, but had only

a limited storage capacity (T.T. VIII 214-215, 163-164, 31-32; IX 222-223) and no capacity, or immediate prospects of a capacity, to incinerate them (T.T. XXV 153, 31, 42; XXIV 70, 121, 141-143, 200-201, 206, 236; XXVI 165-166, 176-178). Far from being inadequate to support his conviction, the evidence of petitioner's guilt was overwhelming.

2. At trial and on appeal, petitioner challenged the reliability of the various chemical analyses that linked him to the contamination of Louisville's sewer system and their acceptance within the scientific community. The court of appeals dealt with petitioner's arguments on the scientific evidence very thoroughly (Pet. App. 34-41), and petitioner no longer is pursuing that issue. In this Court petitioner argues only that he was prejudiced by the evidence of the statistical reliability of the chemical analyses used (Pet. 7-10). Petitioner has thus abandoned his argument that the chemical analytical evidence should not have been admitted because its reliability was not established, and now contends instead that the evidence establishing that reliability should not have been admitted. That contention is also without merit.

Petitioner's suggestion that the statistical reliability evidence involved a quantification of the likelihood of his guilt is plainly wrong. That evidence simply provided the foundation of reliability for introduction of evidence that linked petitioner with the sewer and treatment plant contamination. Neither is there any conflict among the circuits about the admissibility of such evidence. The statistical evidence demonstrating the reliability of oil identification techniques was unlike the "speculative and confusing" testimony and closing argument in *United States* v. *Massey*, 594 F.2d 676, 680-681 (8th Cir. 1979), upon which

petitioner relies. In *Massey*, the witness stated that "in examining about probably in excess of 2,000 cases, * * * I have seen only on a couple of occasions I have seen hair from two different individuals I could not distinguish" (594 F. 2d at 679). The court and the prosecutor erroneously suggested to the jury that this testimony demonstrated that there was only one chance in a thousand for error in hair comparisons. Here, in contrast, the reliability of the tests was established by a carefully planned set of controlled studies by one of the developers of the technique, aimed specifically at determining the soundness of oil fingerprinting as an analytical technique. The background of that work was thoroughly considered by the trial judge in chambers before the jury was allowed to hear the evidence.[7]

3. The United States introduced the grand jury testimony of Hornung (petitioner's friend and business associate) and several of his employees, who could no longer recall at trial such matters as whether they had seen petitioner at the demolition site, or any details about his activities at the site. Each of the witnesses testified at trial that he had testified truthfully before the grand jury; his grand jury testimony was then read to him, and he was given the opportunity to explain it. (See, *e.g.*, T.T. XXII 29-46; XI 83, 108-109.) The jury was in-

[7] The conclusion of the government's expert drawn from his controlled studies was that each of the several methodologies applied to the Louisville samples was at least 90% reliable. T.T. XIX 98; XVII 39. In accordance with a basic rule of statistics, when several techniques are applied to the same sample(s), the statistical reliability of the multiple analyses is cumulative. Here three independent techniques, each established as being at least 90% reliable, yielded a cumulative reliability of the combined methodologies on the order of 99.9%. T.T. XIX 103, 112.

structed to weigh any inconsistencies between the two versions, and to decide the significance to attach to each. T.T. XXVII 152.

Petitioner contends (Pet. 10-14) that this use of the grand jury testimony violated his right to an open trial. This argument is without merit. The witnesses were available in open court at his trial, and had ample opportunity to explain their earlier statements. Indeed, as the Advisory Committee Notes on Fed. R. Evid. 801(d) point out, "[i]f the witness admits on the stand that he made the statement and that it was true, he adopts the statement and there is no hearsay problem." Similarly, there is no "secret trial" problem. Cf. *California* v *Green*, 399 U.S. 149, 164 (1970).

4. Petitioner contends that prior inconsistent statements of two witnesses were not disclosed in time to permit their use in cross examination (Pet. 14-17). The two witnesses were laborers at the demolition site, and the undisclosed statements were statements made to the FBI that were substantially identical to their grand jury testimony and the FBI interview reports, both of which were available to defense counsel before the witnesses testified. T.T. XXI 209-216.[8] Moreover, as the trial court noted (T.T. XXII 9), possession of the witnesses' statements at the time of their testimony would not have aided petitioner because their courtroom testimony was favorable to the defendants. Nothing in the prior statements was exculpatory, and impeachment of the trial testimony was not in defendants' interest. In sum, any error in the delay in disclosing these statements was clearly harmless. See *United States* v.

[8] The delay in the disclosure of the statements was due to government counsel's ignorance of their existence at the time the witnesses testified. T.T. XXI 222-224.

Day, 476 F.2d 562, 569 (6th Cir. 1973); *United States* v. *Thompson*, 422 F.2d 1104, 1108-1109 (6th Cir. 1970); *United States* v. *Williams*, 319 F.2d 479, 481 (6th Cir. 1963).

5. Finally, petitioner argues that the Federal Water Pollution Control Act (FWCPA) does not plainly impose a criminal penalty for discharges of pollutants into waters of the United States or for interfering with the operation of a publicly owned treatment works. That argument is without merit.

Under 33 U.S.C. 1311(a) it is unlawful for any person to discharge a pollutant except in compliance with certain other specified provisions of the FWPCA, among them the permit requirement of 33 U.S.C. (& Supp. III) 1342 and the requirements of 33 U.S.C. (& Supp. III) 1317. Under 33 U.S.C. 1317(d) it is unlawful to violate any effective pretreatment standard (which includes the prohibition against discharging substances which will interfere with the operation of publicly owned treatment works set forth in former 40 C.F.R. 128.131 (1977)).[9] The consequences for violating either of those statutory proscriptions are clearly set out in 33 U.S.C. (Supp. III) 1319(c)(1):[10]

> Any person who willfully or negligently violates section 1311, * * * 1317 * * * or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State * * * shall be punished by a fine of not

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[9] Essentially the same standard is now contained in 40 C.F.R. 403.5.

[10] The FWPCA was amended on December 27, 1977 by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, but 33 U.S.C. (Supp. III) 1319(c)(1) still reads as it did at the time of the events for which petitioner stands convicted.

> less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both.

Petitioner also argues that an administrative order under 33 U.S.C. (Supp. III) 1319(a)(3) is a statutory prerequisite to the institution of a criminal prosecution under 33 U.S.C. (Supp. III) 1319(c)(1). But Subsection (c)(1) contains absolutely no suggestion that there is any administrative prerequisite to a criminal action; nor is there any reference to the criminal provisions of the FWPCA in Subsection (a), which addresses administrative orders. *United States* v. *Frezzo Bros.*, 602 F.2d 1123, 1136 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980), expressly rejects the claim that Congress intended to permit the criminal prosecution of willful polluters only after prior notification, followed by continued polluting in the face of such notice. See also *United States* v. *Phelps Dodge Corp.*, 391 F. Supp. 1181 (D. Ariz. 1975); cf. *United States* v. *Hamel*, 551 F.2d 107, 109 (6th Cir. 1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1981

APPENDIX

40 C.F.R. 128.131 (as in effect in 1977; subsequently amended and repromulgated as 40 C.F.R. 403.5; 43 Fed. Reg. 27747 (1978))

§ 128.131 Prohibited wastes.

No waste introduced into a publicly owned treatment works shall interfere with the operation or performance of the works. Specifically, the following wastes shall not be introduced into the publicly owned treatment works:

(a) Wastes which create a fire or explosion hazard in the publicly owned treatment works.

(b) Wastes which will cause corrosive structural damage to treatment works, but in no case wastes with a pH lower than 5.0, unless the works is designed to accommodate such wastes.

(c) Solid or viscous wastes in amounts which would cause obstruction to the flow in sewers, or other interference with the proper operation of the publicly owned treatment works.

(d) Wastes at a flow rate and/or pollutant discharge rate which is excessive over relatively short time periods so that there is a treatment process upset and subsequent loss of treatment efficiency.

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